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AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES OF AMERICA, PETITIONER,
v.
SUDA REYNOLDS.
No. 591.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

On April 4, 1917, the United States filed its bill of complaint in the District Court of the United States for the Western District of Oklahoma in behalf of Claudius Tyner and 10 other persons as heirs at law of Stella Washington, deceased, a member of the Absentee Shawnee Tribe of Indians of Oklahoma, seeking to cancel a deed made by Claudius Tyner to Suda Reynolds on February 17, 1917, attempting to convey an undivided one-eleventh interest in a certain tract of land inherited by said 11 heirs from said Stella Washington, an Absentee Shawnee allottee thereof, under which deed said Suda Reynolds as grantee therein was seeking to maintain a suit

for partition in the Superior Court of Pottawatomie County, Okla. (R. 2–5).

The tract of land was one the legal title to which was held by the United States in trust for Stella Washington, and, in case of her death, for her heirs, for a period of 25 years, at the expiration of which time the United States would convey the same by patent in fee, discharged of said trust, to said Indian or her heirs, as aforesaid, unless the trust period had been extended by the President for a longer period (R. 3).

The allotment and conveyance of these lands were made under the provisions of the act of Congress approved February 8, 1887, 24 Stat. 388, c. 119, as amended by the act of Congress of March 3, 1891, 26 Stat. 989, 1019, c. 543 (R. 2–4).

These acts provided that the allotments should be made under the direction of the Secretary of the Interior, and that upon approval of the allotments by him he should cause patents to issue therefor, in the name of the allottees, which patents—

> shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, dis-

> charged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void. (Sec. 5, act of 1887.)

The allotment of this land to Stella Washington was made and approved by the Secretary on September 16, 1891 (R. 2).

The trust patent was issued to the United States in trust, as aforesaid, on February 6, 1892 (R. 2).

On November 24, 1916, the President, by Executive order, duly made and proclaimed, extended said trust period for 10 years (R. 3).

Thereafter, on February 17, 1917, Claudius Tyner executed said deed to said one-eleventh interest to Suda Reynolds (R. 3).

The bill alleged that the said deed was void because made within the extended trust period (R. 3);

That the original trust period continued for 25 years from February 6, 1892, the date of the patent, and the Executive order of November 24, 1916, was made within 25 years from that date (R. 3);

That the trust period had been extended in this case on November 24, 1916, before any attempted conveyance was made (R. 3).

The answer claimed that the trust period began with the approval of the allotment September 16, 1891; that it terminated September 16, 1916; that on September 17, 1916, Tyner and others were vested with a fee-simple estate, with no uses, and could sell the same; that the President's proclamation on November 24, 1916, could not extend the trust or divest this fee-simple estate (R. 10–13).

The District Court held with the contention of the United States and entered a decree cancelling said deed as void and a cloud on the title (R. 14–16).

On appeal the United States Circuit Court of Appeals for the Eighth Circuit reversed this decree, holding in favor of defendant's contention, and ordered the bill dismissed (R. 21–26).

One judge dissented on the ground that the President had the power to extend after the 25-year period (R. 26, 27).

This court granted the petition of the United States for a writ of certiorari to examine into the last judgment, and the case is here.

POINTS.

The following points are insisted on by the petitioner in certiorari:

First, that the trust period extends for 25 years from the date of the trust patent (February 6, 1892), and not from the date of the approval of the allotment (September 16, 1891). The President's order extending the same was therefore issued in this case during the 25-year period.

Second, that even if the trust period runs from the date of allotment the right of the President to extend such trust period continues until the United States conveys the absolute fee simple title to the allottee or his heirs. That any conveyance of, or contract touching, said lands made until such final patent is made, and the allottee thus invested with a fee-simple title, is absolutely null and void.

Third, that the statute does not limit the right of the President to extend said trust period to 25 years from the date of allotment, or certificate of allotment, and that it exists until the United States has by final patent, as provided by said acts, conveyed the fee to the allottee or his heirs. That on November 24, 1916, within 25 years from the date of the trust patent, or certificate of allotment, before any final patent was issued, and before any attempted sale by Claudius Tyner to Suda Reynolds, the extension of the trust period for 10 years was made by Presidential order and was therefore valid.

ARGUMENT.

I.

The decision of the Departments being that the trust period extends for 25 years from the date of the certificate of allotment (trust patent), the same will be followed unless clearly erroneous.

"The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. * * *

The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret." *United States* v. *Moore*, 95 U. S. 760, 763.

To the same effect are:

Jacobs v. *Prichard*, 223 U. S. 200, 214.
Louisiana v. *Garfield*, 211 U. S. 70, 76.
United States v. *Cerecedo Hermanos y Compania*, 209 U. S. 337, 339.

The Department of the Interior has construed said act of 1887 as follows:

> The language of section 5 of the act of 1887 is "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted," etc. Here, clearly no trust is declared until actual issuance of patent, and the use of a word of the present tense, "does" shows that the trust period begins to run only upon such issuance. The form of patent both under the acts of 1887 and 1906 reads: "and hereby declares that it does and will hold the land thus allotted," etc. This same idea is further expressed in section 6 of the act of 1887, according citizenship to the allottee, which citizenship is not accorded until after issuance of patent, as shown by the following language: "That upon the completion of said allotments, and the patenting of the lands to

said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been *made* shall have the benefit of and be subject to the laws * * * and every Indian born within the territorial limits of the United States to whom allotments shall have been *made* under the provisions of this act * * * is hereby declared to be a citizen of the United States." Under the act of 1906 the allottee is accorded citizenship only upon the expiration of the trust period and issuance of patent in fee at any time the Secretary of the Interior may be satisfied of the competency of the allottee. Provision is also made in said act, as well as in the act of May 29, 1908, for issuance of patents in fee to the heirs of deceased allottees or their lands may be sold and patent issued to the purchasers. It thus follows that by ruling that an allotment is *made* only upon issuance of trust patent, and that the trust period begins to run only from that date, the allottee or his heirs, may, nevertheless, curtail that period by securing patent in fee. While the act of 1906 does not in terms prescribe the form of trust patent, as does section 5 of the act of 1887, yet the logical and inevitable conclusion is that it was intended by Congress that the provisions of the act of 1906, in respect to the lands of deceased allottees, should supersede those of section 5 in cases where the allotment was made after the said act of 1906. (38 L. D. 559, 561.)

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This construction is concurred in by the Department of Justice in an opinion by Attorney General Miller to the Secretary of the Interior, May 21, 1890:

> The patent to be first issued to the Indian allottee under section 5 of the act of 1887 is not intended to convey to him the title of the United States, but is in the nature of a declaration of a trust in the land or a covenant to stand seized of it to the use of the allottee and his heirs until the time shall have arrived when it shall be deemed proper to put an end to the trust by vesting the legal title in him or his heirs.
>
> The effect of the allotment and declaration of trust are to place the allottee in possession of the land allotted and give him a qualified ownership therein, and the extent to which the allottee is thus restricted as a proprietor remains now to be considered, in so far as necessary to answer the questions submitted. (19 Op. Atty. Gen. 559, 562.)

The President's order of extension also deals with the 25-year period as running from this point of time.

II.

The trust period extends for 25 years from the certificate of allotment (trust patent) and until by execution of the final patent the legal title in fee simple is vested in the Indian allottee or his heirs.

That the word "patent" where first used in the act means certificate of allotment has been settled by this court. *United States* v. *Rickert*, 188 U. S. 432.

This land was originally tribal land. The scheme of the act was to convert the holdings from tribal holdings to individual fee-simple estates.

That the individual Indian was no more competent to own and dispose of these lands than a minor of immature years was recognized. The title therefore was vested in the United States in trust.

The statute made the trust not less than 25 years. The President by Executive order might extend this period of tutelage. He is not limited to 10 years nor to one extension. There is no provision that he shall extend the period within the 25 years or lose his power so to do.

The purpose of this act has been declared by the decision of this Court in *Monson* v. *Simonson*, 231 U. S. 341, 345:

> The act of 1887 was adopted as part of the government's policy of dissolving the tribal relations of the Indians, distributing their lands in severalty, and conducting the individuals from a state of dependent wardship to one of full emancipation, with its attendant privileges and burdens. Realizing that so great a change would require years for its accomplishment and that in the meantime the Indians should be safeguarded against their own improvidence, Congress, in prescribing by the act of 1887 a system for allotting the lands in severalty, whereby the Indians would be established in individual homes, was careful to avoid investing the

> allottee with the title in the first instance, and directed that there should be issued to him what is inaptly termed a patent (*United States* v. *Rickert*, 188 U. S. 432, 436), but is in reality an allotment certificate, declaring that for a period of twenty-five years, or such enlarged period as the President should direct, the United States would hold the allotted land in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and at the expiration of that period would convey to him by patent the fee, discharged of the trust, and free of any charge or incumbrance; and, as a safeguard against improvident conveyances or contracts made in anticipation of the ultimate or real patent, it was expressly provided that any conveyance of the land, or any contract touching the same, made before the expiration of the trust period should be absolutely null and void. It is thus made plain that it was the intention of Congress that the title should remain in the United States during the entire trust period and that, when conveyed to the allottee or his heirs by the ultimate patent at the expiration of that period, it should be unaffected by any prior conveyance or contract touching the land.

To the same effect are other decisions of the Federal courts. *United States* v. *Rickert*, 188 U. S. 432; *Hallowell* v. *Commons*, 210 Fed. 793; *Beam* v. *United States*, 162 Fed. 260; *United States* v. *Allen et al.*, 179 Fed. 13.

III.

Other acts of Congress creating trust periods in like cases of conversion of Indian tribal lands into individual estates make the period run from the date of certificate of allotment (trust patent), and not from the approval of the schedule of allotments. Unless the language in this act forbids a like construction the same period would be intended.

Some of these acts are:

Act of March 2, 1889 (Peoria act), 25 Stat. 1013, 1014, which provides that—

> The land so allotted shall not be subject to alienation for twenty-five years from the date of the issuance of patent therefor.

And this is reiterated in the patent issued.

Act of March 2, 1895 (Quapaw act), 28 Stat. 876, 907, which contains the proviso—

> That said allotments shall be inalienable for twenty-five years from and after the date of said patents.

Choctaw-Chickasaw act, approved July 1, 1902, 32 Stat. 641, where Congress defined the restricted term in this language:

> (SEC. 12) Homesteads * * * shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.
>
> (SEC. 13) The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.
>
> (SEC. 16) All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein pro-

vided, shall be alienable after issuance of patent, as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent.

Act of July 1, 1902, 32 Stat. 716 (secs. 13, 14, and 15), (Cherokee allotment act), which contains provisions similar to those in the Choctaw-Chickasaw act.

So far from the express direction in other acts of like nature designating the date of the certificate of allotment as the beginning of the trust period of 25 years being an argument in favor of the defendant Reynolds it is directly otherwise.

First. It answers the entire argument that Congress could not be supposed to make this period dependent on the ministerial act of issuing the trust patent, or certificate of allotment, after the schedule had been approved. It demonstrates that Congress had done the very thing in many cases.

Second. The act of March 3, 1887, does not declare that the period of 25 years shall commence with the allotment. The provisions are:

First. The Secretary shall approve the allotment.

Second. He shall then cause patents (certificates of allotment) to issue.

Third. These "patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian," etc.; and "at the expiration of said period the United States will convey the same by patent to said Indian," etc.

No title or duty of holding of said land in trust goes to the United States until this trust patent or certificate of allotment issues. The making of the allotment is not complete until this certificate is issued.

Clearly, there is no reason to construe the 25 years as running in this case from any period other than that fixed in all other cases, *i. e.*, 25 years from date of the trust patent, or certificate of allotment.

IV.

The President has the right to extend the trust period at any time until the United States has surrendered its trust by conveying the absolute fee-simple title to the Indian allottee or his heirs.

The act of Congress of February 8, 1887, in effect declares the allottee incapable of taking the legal title to and of exercising power of disposition of, or of contract concerning, his allotment. The period of such disability is fixed at not less than 25 years, and to such further time as the President by Executive order may extend.

The method by which such allottee (or his heirs) were to be placed in full ownership and control of the allotment was through the execution of the final fee-simple patent by the United States.

The act could have made the title vest under the original trust patent on the expiration of the trust period. It did not do this, but, instead, provided "that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust

and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period."

The effect of this act is therefore to leave the title in the United States, and the trust in existence, until the fee-simple patent is executed and title by it vested in the allottee or his heirs; and the President, until such transfer of the title, can carry out the Congressional direction to exercise the discretion of extending the trust period and withholding the conveyance in fee.

As was said by this court in the case of *Michigan Land and Lumber Company* v. *Rust*, 168 U. S. 589, 592–593:

> Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the Government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. *Strother* v. *Lucas*, 12 Pet. 410, 454; *Grignon's Lessee* v. *Astor*, 2 How. 319; *Chouteau* v. *Eckhart*, 2 How. 344, 372; *Glasgow* v. *Hortiz*, 1 Black, 595; *Langdeau* v. *Hanes*, 21 Wall. 521; *Ryan* v. *Carter*, 93 U. S. 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat. sec. 2449; *Frasher* v. *O'Connor*, 115 U. S. 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue

> of the patent, *Bagnell* v. *Broderick*, 13 Pet. 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.

When the act requires the issuance of a patent to perfect a grant, until such patent is issued the control of Congress over lands allotted to Indians continues. *United States* v. *Rowell*, 243 U. S. 464, 469.

In this case Congress had acted, and in providing for the issuance of the patent at a future date had ordered that if the President in his discretion thought it should be longer withheld it should be done.

Let it be noted that the provision declaring invalid attempted conveyances or contracts, affecting these allotments, are not restrictions upon the power of disposition, of one holding a title to property. In this case no title ever vested, or was to vest, in the allottee until the final patent issued to her. As this Court said in *United States* v. *Rickert*, 188 U. S. 432, 436:

> * * * In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee. This interpretation of the statute is in harmony with the explicit declaration that any conveyance of the land, or any contract touching the same, while the United States held the title in trust, should be absolutely null and void. So that the United States retained its hold on the

> land allotted for the period of twenty-five years after the allotment, and as much longer as the President, in his discretion, should determine.

The further language of this case relating to the taxation of these lands clearly shows that the control of the United States under the act of February 8, 1887, continues until the final patent issues; that until such time the Indian has only the right to occupy and cultivate, and is prohibited from attempting to contract or convey. This Court said (p. 437):

> If, as is undoubtedly the case, these lands are held by the United States in execution of its plans relating to the Indians—without any right in the Indians to make contracts in reference to them or to do more than to occupy and cultivate them—until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the State of South Dakota, for state or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians. These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship.

If the statutes under which these lands were being converted from tribal to individual ownership had contained no provision for extending the 25-year period of restricted ownership, Congress could by an act passed after the expiration of said 25 years have reimposed conditions on such ownership. *Brader* v. *James*, 246 U. S. 88; *Talley* v. *Burgess*, 246 U. S. 104.

In this case Congress had acted and expressed its general legislative purpose that these Indians should be restricted in ownership for 25 years and so long thereafter as the President considered them still needing such tutelage. The same construction as to the right to act, after the 25-year period had run, should be applied to the President in carrying out the act of Congress, where no intervening rights of third persons exist, as would apply to Congress if acting directly.

V.

The Executive order extending the term of the trust was definite and in accordance with the act of Congress.

The names of all allottees and designation of all allotments of and full description of all trust patents or certificates for the Absentee Shawnee Indians were of record in the Land Department.

The Executive order extended the trust periods of all such allotments as expired in the year 1917 for 10 years, except those of certain designated names.

The act of February 8, 1887, did not prescribe any form to be used or any method to be observed by the President in extending such periods.

The records aforesaid and the order, applicable thereto, showed everything that an enumeration, in the order, of the allottees whose trust periods were extended, could show.

The exclusion of certain persons on said lists, for whom patents were to be issued, shows that the cases were individually considered and acted on.

The action is the equivalent of making a list of those whose trust terms were extended.

VI.

The order does not suspend the acts of Congress permitting sales before the expiration of trust periods on approval of the Secretary of the Interior.

The several acts of Congress permitting Indian allottees to sell, with the approval of the Secretary of the Interior, applies during the original periods of incapacity fixed by acts of Congress as well as during the periods of extended incapacity arising from Executive order.

It is as legitimate to say that this power of sale with the approval of the Department conflicts with the original prohibition of sale and impairs its term as it is to say that there would be a conflict between the exercise of such power during an extended period and the order making such extension.

The President's order simply extends the time period named. It leaves the allottee just as if the

extended period had been originally written into the act.

The provisions for sale with the approval of the Secretary of the Interior create a method whereby in proper cases a sale may be permitted during the period of tutelage, whether continuing under the original term of the act or the additional term provided for by the act through Presidential order.

The decree of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

ALEX. C. KING,
Solicitor General.

FEBRUARY 1919.

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